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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/714,694	11/17/2003	Lowell R. Wedemeyer	ChcekAir	5398
41360	7590	07/19/2007		
LOWELL R. WEDEMEYER 719 YARMOUTH ROAD, SUITE 204 PALOS VERDES ESTATES, CA 90274			EXAMINER JACKSON, BRANDON LEE	
			ART UNIT	PAPER NUMBER
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/714,694	Applicant(s) WEDEMEYER, LOWELL R.	
	Examiner Brandon Jackson	Art Unit 3772	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 18 May 2007.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-40 is/are pending in the application.
- 4a) Of the above claim(s) 1-32 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 33-40 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date: _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date: _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

This action is in response to amendments/arguments filed 5/18/2007. Currently, claims 1-40 are pending in the instant application.

Response to Arguments

Applicant's arguments filed 5/18/2007 have been fully considered but they are not persuasive. Applicant argues the Leal device does not compress when the user's jaw closes and expand when the user's jaw expands, however the Leal device may be compressed and it will return to its' predetermined position after the force is removed (col. 1, lines 55-60). Applicant argues that the loops of Leal do not have a span size that can be changed when a loop size is adjusted. However, because the Leal device is made of a continuous piece of metal and is made by bending the wire (cols. 1-2, lines 67-3), it is obvious that if one loop size is increases it would decrease the loop or span size of another loop. Applicant argues Leal's cotton roll does not constitute a conduit, under the Applicant's definition; however, Applicant defines a conduit to be a hollow tube or channel capable of conveying fluid. Leal's cotton roll is a conduit because it has a channel that the wire elements pass through and it is capable of conveying fluid, which is the purpose of the cotton rolls. Applicant argues the Leal device does not fit in a single cheek, however, Applicant fails to claim that the device only fit in one cheek. The claim states "a spring element adapted to be placed within a user's cheek pouch,..." but does not limit the device to only fitting in one cheek pouch because of the comprising language in the preamble. Applicant argues that the Leal device is intended

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to maintain the mouth open; however, the device can be compressed by the mouth if the jaw applies force, even though the intended use is to hold the mouth open. If two fingers can compress the device, the much stronger jaw can compress it. Applicant argues that the adapted to language has not been considered. The "adapted to language" is not positively claiming any structure: however, the Leal device is fully capable of performing all the functions of the claimed invention, therefore it accomplishes the adapted to functions. Applicant argues that the device is not used with a work piece. However, the Leal device is used during dental procedures, therefore it must be used with dental work pieces.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 33- 36 and 39-40 are rejected under 35 U.S.C. 102(b) as being anticipated by Leal (U.S. Patent 5,199,872). Leal discloses a cheek anchor device (10) for maintaining mouth position (col. 1, lines 64-66), comprising a spring element (40) adapted to be placed in the cheek pouch, compressed when the jaw is closed, and to resiliently expand to open the mouth during a procedure (col. 1, lines 7-12). The "adapted to ..." language has not been considered since it has been held that the recitation that an element is "adapted to" perform a function is not a positive limitation,

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but only requires the ability to so perform. It does not constitute a limitation in any patentable sense. *In re Hutchinson*, 69 USPQ 138. The device (10) has a conduit col. 4, lines 56-63) for fluid. Examiner has given the term conduit its broadest, most reasonable definition, which is an element with a hole therethrough that can transfer air of fluid, which is the cotton surround the spring element (40). The device (10) is formed of metal (col. 1, lines 52-55) and configured into a plurality of loops (fig. 1), wherein if one loop has its span increased or decreased it will result in another loop increasing or decreasing span because the device is made of continuous pieces of wire. The plurality of loops is combined to form a spring element (40) with an element span size (fig. 1).

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

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Claims 37-38 are rejected under 35 U.S.C. 103(a) as being unpatentable over Leal (U.S. Patent 5,199,872) in view of Diaz (U.S. Patent 4,041,937). Leal substantially discloses the claimed invention, see claim 33 rejection above, Leal fails to disclose the spring element is adapted to receive impregnation or coating with a substance to be released in the user's mouth. However, Diaz teaches cotton swab (28a) moistened with antiseptic (col. 1, lines 58-61). Therefore, it would be obvious to one of ordinary skill in the art at the time of the invention to coat the cotton of the Leal device with antiseptic to prevent infection in the mouth and provide a pleasant taste to the user. The "adapted to ..." language has not been considered since it has been held that the recitation that an element is "adapted to" perform a function is not a positive limitation, but only requires the ability to so perform. It does not constitute a limitation in any patentable sense. *In re Hutchinson*, 69 USPQ 138.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Brandon Jackson whose telephone number is (571)272-3414. The examiner can normally be reached on Monday - Friday 8-5:30.


If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Patricia Bianco can be reached on (571)272-4940. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Brandon Jackson
Examiner
Art Unit 3772

BLJ


PATRICIA BIANCO
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7/16/07